No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate."

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INTEREST OF THE *AMICUS CURIAE*[1]

The Center for Individual Rights ("CIR") is a public interest law firm. It has represented parties in numerous cases concerning issues related to the First Amendment, including *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016), *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995), *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002). It has also submitted *amicus* briefs in cases involving important First Amendment issues.

CIR believes that the Ninth Circuit's practice of approving *cy pres* settlement agreements in class action litigation in which the proceeds are awarded to third parties implicates the First Amendment rights of class members because such settlements compel class members to subsidize speech. CIR submits this *amicus* brief to point out the dangers of adopting such settlements and urge the Court to grant the petition and limit the use of *cy pres* settlements where such First Amendment concerns are present.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, financially contribute to preparing or submitting this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37. All parties have consented to this filing.

SUMMARY OF ARGUMENT

Damages awarded pursuant to a class action settlement belong to the class members. Thus, when a court permits a *cy pres* award to third parties, it is endorsing a transfer of value from the class members to the third parties; in this case, charities chosen by class counsel and the defendants. The *cy pres* funds may then be used to engage in speech or political activity with which class members may very well disagree, in violation of their First Amendment rights.

An affirmative opt-out requirement for class members is not carefully tailored to minimize the infringement of free speech rights and does not satisfy the requirements of the First Amendment. To the contrary, class members are required to bear the entire burden of complying with the opt-out procedure or risk subsidizing speech with which they disagree. The desires of class counsel and defendants to settle cases expediently and cheaply do not qualify as compelling interests sufficient to justify this infringement.

ARGUMENT

I. USE OF *CY PRES* AWARDS IN CLASS ACTION SETTLEMENTS COMPELS CLASS MEMBERS TO SUPPORT SPEECH WITH WHICH THEY MAY DISAGREE

Damages awarded pursuant to settlement of a class action belong to the class members. *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). When the court permits a *cy pres* award, therefore, it is ratifying a mandatory transfer of value from class members to a third party. That organization can then use the funds provided by the settlement agreement to pursue its own goals, including (understandably) by engaging in various forms of speech. In effect, the court forces class members to support groups whose views may be disagreeable to them. *See Knox v. SEIU*, 132 S. Ct. 2277, 2289 (2012) ("Closely related to compelled speech . . . is compelled funding of other private speakers or groups.").

Here, the court awarded *cy pres* funds to Harvard Law School, Stanford Law School, the MacArthur Foundation, and AARP, Inc. The only conditions attached were that the recipients agree to "devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." *App.* at 84. The settlement agreement does not otherwise limit the use of the *cy pres* funds, or even define "initiatives." Nor is there any sort of continuing supervision on the use of funds after they are distributed to the recipients. Under the settlement agreement approved here, an "initiative" could be virtually

anything and it could take place many years from now.

Thus, the AARP (or any other recipient) might support an initiative relating to internet privacy which makes internet use marginally more difficult or costly. Under the settlement agreement, AARP could use *cy pres* funds to lobby Congress or state legislatures for that initiative.[2] Should AARP use *cy pres* funds to support a similar initiative in the future, a class member is left completely without recourse.

This type of *cy pres* award violates the First Amendment because the Court has held that the government "may not . . . compel the endorsement of ideas that it approves." *Knox*, 132 S. Ct. at 2288. "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001).

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[2] This concern is not imaginary. For several years, AARP has lobbied Congress and the F.C.C. in favor of net neutrality, a fairly controversial set of rules regulating internet service providers, with which many disagree. *See* Neil Walters, *The Importance of the Internet to Older Americans*, AARP Public Policy Institute (Oct. 2, 2017), https://www.aarp.org/ppi/info-2017/importance-of-an-open-internet-to-older-americans.html, Anne Broache, *Push for Net Neutrality Mandate Grows*, CNet (March 30, 2006), https://www.cnet.com/uk/news/push-for-net-neutrality-mandate-grows/. While "net neutrality" may not itself be an issue involving internet privacy, the AARP's activities on that topic demonstrate that it does not shy away from controversial political issues. And given that money is fungible, the funding of any privacy "initiatives" will leave more available for overtly political efforts even if the privacy initiatives would not be so characterized.

The Court has approved a narrow class of compelled speech which might not violate the First Amendment—compelled contributions to a trade or professional association pursuant to a comprehensive regulatory scheme. *Id.* But even then, mandatory contributions are only permitted "insofar as [it is] a necessary incident of the larger regulatory purpose which justified the required association." *Knox*, 132 S. Ct. at 2289. (internal quotation marks omitted).

Forced subsidies to charities resulting from *cy pres* awards in class action settlements are not incident to a comprehensive regulatory scheme. Class actions are governed by Rule 23 along with numerous state and federal laws governing the underlying claims in the litigation, not a single comprehensive regulatory scheme covering a discrete subject matter.

II. REQUIRING CLASS MEMBERS TO AFFIRMATIVELY OPT OUT VIOLATES THE FIRST AMENDMENT

This Court has also expressed doubts about the use of opt-out systems in the context of compulsory union subsidies. In *Knox*, the Court noted that "acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment priciples." 132 S. Ct. at 2290. While there are subtle differences between the context of a *cy pres* award and mandatory union fees, the First Amendment rights at stake are identical, and courts "do not presume acquiescence in the loss of fundamental rights." *Id.* at 2290. "Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union's

political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment?" *Id.* Similarly, class members should not be forced to subsidize preferred charities or the initiatives these charities engage in. Whether or not an opt-out mechanism is sufficient in a traditional class action, once a *cy pres* award is contemplated, an opt-in mechanism is constitutionally required because the court cannot presume acquiescence by class members in the loss of their First Amendment rights.

An opt-out requirement cannot be reconciled with *Knox* and other First Amendment precedents. Put simply, the requirement that class member affirmatively object to subsidizing a charity's political or ideological activities is in no way "'carefully tailored to minimize the infringement' of free speech rights," as the First Amendment requires. *Knox*, 132 S. Ct. at 2291 (quoting *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 (1986)). This Court's review is necessary to carry *Knox*'s reasoning—which reflects First Amendment imperatives—to its logical conclusion.

In *Knox*, the Court reviewed the First Amendment claims of dissenting public-sector workers who were charged an "Emergency Temporary Assessment to Build a Political Fight–Back Fund." *Id.* at 2285, 2287. Because "a special assessment billed for use in electoral campaigns" went beyond anything the Court had previously considered, it declined to simply rely on its prior cases' implicit approval of opt-out schemes for dissenting employees. *Knox*, 132 S. Ct. at 2291. Instead, it considered the question *ab initio*.

The reasoning in *Knox* shows that opt-out schemes like the one here are constitutionally untenable because they violate dissenting class members'

free speech rights. The First Amendment requires that "any procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech rights." *Id.* at 2291(quoting *Hudson*, 475 U.S. at 303). Accordingly, "measures burdening the freedom of speech or association must serve a 'compelling interest' and must not be significantly broader than necessary to serve that interest." *Id.* In the context of compulsory union dues, the government's interest in permitting a union to collect fees from nonmembers is solely to prevent them "'from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred.'" *Id.* at 2289 (quoting *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 181 (2007)). That interest, of course, does not extend to collecting expenses for political or ideological activities from dissenting employees. *Id.* at 2290. Rather, collection of fees for such activities is the "infringement of free speech rights" which must be "minimized."

Applying these principles, the Court held that a public-sector union imposing a special assessment or dues increase "may not exact any funds from nonmembers without their affirmative consent." *Id.* at 2296. An opt-out scheme, the Court recognized, "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Id.* at 2290. Against this risk, there is simply no "justification for putting the burden on the nonmember to opt out of making such a payment." *Id.* Instead, any such risk must be borne by "the side whose constitutional rights are not at stake"—in *Knox*, the labor union. *Id.* at 2295. Thus, rather than presume non-members' willingness to fund a union's political or ideological activities, the

law requires their affirmative consent. After all, the courts "do not presume acquiescence in the loss of fundamental rights." *Id.* at 2290 (quoting *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 682 (1999)).

A fortiori, requiring class members in a *cy pres* settlement to opt out of the class or risk subsidizing some unknown "initiative" in the future cannot withstand First Amendment scrutiny. Such "initiatives" could very well include political or ideological activities with which they may disagree. Worse, class members have no way of knowing what they will be subsidizing—unlike unions, the third parties may have no track record on which the class members could make such a judgment. The desires of class counsel and defendants to settle the case expediently and cheaply do not qualify as a compelling interest.

Further, the defendants in the class action, meanwhile, have no freedom of speech rights at risk (on the contrary, they along with class counsel chose the benefiting charities) but nonetheless enjoy the presumption of financial support in the Ninth Circuit.

CONCLUSION

For the reasons given above, this Court should grant the petition.

Respectfully submitted,

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